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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FOURTH AGE LTD., *et al*,

Plaintiffs,

v.

WARNER BROS. DIGITAL DISTRIBUTION, *et al*,

Defendants.

WARNER BROS. DIGITAL DISTRIBUTION INC., *et al*,

Counterclaim Plaintiffs,

v.

FOURTH AGE LTD., *et al*,

Counterclaim Defendants.

Case No. 12-9912-ABC (SHx)

DISCOVERY MATTER

REPLY IN SUPPORT OF WARNER'S MOTION TO COMPEL DOCUMENTS AND PRIVILEGE LOG

[Declaration of Victor Jih Filed Concurrently Herewith]

Judge: Hon. Audrey B. Collins
Magistrate: Hon. Stephen J. Hillman

Hearing Date: February 24, 2014
Hearing Time: 2:00 p.m.

Discovery Cutoff: April 15, 2014

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I. INTRODUCTION

The Tolkien/HC Parties seek to excuse themselves from basic discovery obligations because they and their primary counsel are located in the United Kingdom. They oppose this motion and the entry of an order compelling compliance with their discovery obligations based on unsworn accounts of what unnamed third parties abroad may have done to collect responsive documents; they make vague promises to produce documents by some undefined future date; they claim that documents retained by their former law firm should be treated as if held by a "third party located overseas"; they make unsubstantiated claims of burden to avoid collecting critical electronic documents; they refuse to live up to their prior agreement to provide custodian information; they agree to provide a truncated log that they have admitted would be meaningless to evaluate their baseless claims of privilege; and they point to preservation notices issued in a different case to block further inquiry into their apparent failures to adequately preserve documents in this one. Having elected to file suit against Warner (and Zaentz) in the Central District of California, the Tolkien/HC Parties must be held to comply with their discovery obligations just like any litigant.

The Tolkien/HC Parties represent to the Court that the issues in Warner's motion are "moot." But, if the issues in Warner's Motion are truly "moot" as the Tolkien/HC Parties state, then they should have no objection to the Court's entry of the proposed order. The Tolkien/HC Parties themselves insisted that all parties be "substantially complete" with their document productions by November 4, 2013. Three months later, however, their document production remains plainly deficient. To avoid any further delays, the Court should order the Tolkien/HC Parties to complete their production, with accompanying custodian information, and to produce a meaningful privilege log—all within thirty days.

II. THE TOLKIEN/HC PARTIES FAILED TO TIMELY CONFER

The Local Rules are clear that "unless relieved by written order of the Court upon good cause shown, counsel for the opposing party shall confer with counsel for the moving party *within ten (10) days after the moving party serves a letter requesting such conference.*" L.R. 37-1. (emphasis added). The Tolkien/HC Parties now suggest that despite their own failure to confer within *twenty* days—twice the time provided by the rules—they have somehow complied with their obligations under the rules. A party does not satisfy its obligations to timely confer, however, where it fails to respond until prompted, promises to meet and confer at a later date, and then makes repeated requests to postpone.

Warner served The Tolkien/HC Parties with a letter requesting a meet-and-confer conference pursuant to Local Rule 37-1 on January 7, 2014. Lens Decl., Ex. 1.[1] The Tolkien/HC Parties did not respond, orally or in writing. On the ninth day, Warner reached out again to the Tolkien/HC Parties to request a meet and confer. Lens Decl., Ex. 2. Then, and only then, did the Tolkien/HC Parties reply.

There was no reason why the Tolkien/HC Parties should have been unable to substantively meet and confer during the ten-day period provided by the Local Rules. During this time, the Tolkien/HC Parties took only one deposition—in Los Angeles, at their own counsel's office, and with the attendance of only a single lawyer on behalf of the Tolkien/HC Parties. Nevertheless, when the Tolkien/HC Parties requested that Warner accommodate a delay of six days, Warner agreed. *Id*. The day before the parties were scheduled to meet and confer, however, the Tolkien/HC Parties abruptly canceled and asked that the parties' conference be pushed back an additional week—more than *three weeks* after Warner served its initial letter requesting such a meeting. *Id*. Although Warner remained willing to

[1] All references to the Lens Declaration are to Docket No. 99-1.

meet and confer, Warner made clear that it would not tolerate efforts by the Tolkien/HC Parties to indefinitely delay resolution of these discovery issues. *Id*.

Tellingly, it was only *after* Warner filed its Motion that the Tolkien/HC Parties confirmed a meet and confer. Haye Decl., Ex. G. Similarly, it was only *after* Warner filed its Motion that Warner received substantive responses from the Tolkien/HC Parties to *any* of the questions posed in Warner's January 7 letter.

The Tolkien/HC Parties now suggest that a conference between the parties on January 30 resolved or narrowed all of the issues raised in Warner's Motion. Opp. at 1. Not so. That conference was filled with nothing more than vague assurances about the completeness of the Tolkien/HC Parties' collection efforts. If anything, the conference confirmed that these assurances were not based on personal knowledge, but rather on what the Tolkien/HC Parties' counsel "understood" had been collected in light of information relayed to them by unidentified overseas lawyers. For instance, when pressed for details about who had gathered the universe of potentially responsive hard-copy documents from the Tolkien Parties, or how that universe had been assembled, counsel for the Tolkien/HC Parties admitted that they could only provide answers based on how "they think" those documents had been collected. Jih Decl., ¶ 12. Similarly, they could only relay to Warner what they "had been told" HarperCollins' in-house lawyers in the UK did to collect responsive hard-copy documents from their custodians. *Id*. at ¶ 13.

Warner offered to withdraw its Motion on January 31 if the Tolkien/HC Parties would stipulate to provide the documents and information that Warner requested by a date certain (with the exception of allegedly "inaccessible" Manches and HarperCollins backup tapes). Haye Decl., Ex. J. The Tolkien/HC Parties refused. *Id*., Ex. K. Although unhappy with the date Warner proposed in its draft stipulation, the Tolkien/HC Parties never offered an alternative. *Id*. They also suggested that it would be "impossible" to obtain their clients' approval to sign

such a stipulation before filing their opposition to Warner's Motion, notwithstanding the fact that (1) they claimed even before the parties' conference the day before that the issues in Warner's Motion were "moot," suggesting that there should have been no approval left to seek; and (2) they still had three full days before their opposition was due in which to obtain their client's approval. The fact that the Tolkien/HC Parties would not agree, by *any* date certain, to the stipulation confirms that the issues raised in Warner's Motion are not actually moot.

III. THE TOLKIEN/HC PARTIES MUST COMPLETE THEIR DOCUMENT PRODUCTION BY A DATE CERTAIN

Warner has served three sets of Requests for Production on the Tolkien/HC Parties—the first on March 20, 2013, the second on September 11, 2013, and the third on October 29, 2013. The Tolkien/HC Parties do not dispute that they insisted that all parties be "substantially complete" with their productions by November 4, 2013, or that they unilaterally demanded that depositions be held off until all parties had met that standard. It turns out now, however, that despite pressing forward with depositions, the Tolkien/HC Parties are far from "substantially complete" with their own document productions. For example, the Tolkien/HC Parties have only recently agreed to produce electronic documents from some sources, and now make unsubstantiated claims of burden in maintaining that they need not collect ESI from others. They continue to assure Warner based on representations from third parties that their collection of hard-copy documents is substantially underway, but they still refuse to confirm that their collections will be completed by a date certain. They still refuse to provide meaningful custodian information, notwithstanding their previous agreement. And, they insist that there are no open issues with respect to their document preservation notices despite failing to provide answers to many of Warner's questions. These positions underscore the necessity for the Court's order.

A. The Tolkien/HC Parties Must Complete Their Production of Electronic Documents by a Date Certain

The Tolkien/HC Parties represent that they have already undertaken a comprehensive collection and production of electronic documents. To date, however, the Tolkien/HC Parties' production is comprised of less than 9% electronic documents.[2] This is not by accident—the Tolkien/HC Parties have deliberately refrained from collecting ESI from the Tolkien Parties in reliance upon the fiction that Steven Maier and Cathleen Blackburn, the Tolkien Parties' long-standing outside counsel who function in both a legal and business capacity, followed a "print-to-file" policy that would, in their view, render the entirety of these witnesses' electronic files duplicative. This is an inadequate basis on which to refuse the collection of ESI, and the Tolkien/HC Parties no longer even try to defend this practice. Now, with one exception, the Tolkien/HC Parties claim that their production of electronic documents is underway. Aside from this exception, however, the Tolkien/HC Parties offer no reason why they should not be compelled to complete their production of electronic documents within 30 days.

The Tolkien/HC Parties' only objection concerns the backup tapes for Manches and HarperCollins. But this objection has no merit. As a threshold matter, the Tolkien Parties try to escape their obligation to collect ESI from their former law firm by relying on a characterization of Manches as a "third party located overseas." Opp. at 14. But Manches is not a third party. *See, e.g., MTB Bank v. Fed. Armored Exp., Inc.*, 1998 WL 43125 (S.D.N.Y. Feb. 2, 1998) ("Under Fed. R. Civ. P. 34 … the clear rule is that documents in the possession of a party's current *or former counsel* are deemed to be within that party's "possession, custody and control.") (emphasis added). Nor does it matter that Manches is located overseas. *See, e.g., Wingnut Films v. Katja Motion Pictures*, 2007 WL2758571,

[2] The Tolkien/HC Parties have produced only 195 electronic documents from HarperCollins, which represents only 2% of their total document production.

*19 (C.D. Cal. Sept. 18, 2007) (Hillman, Mag., opinion) (ordering defendant to instruct its foreign outside counsel to produce responsive, non-privileged documents). The fact that documents are located abroad does not diminish the Tolkien/HC Parties' discovery obligations to review and to produce them. The fact that Manches has until now been slow to respond to Greenberg's "repeated follow-up communications," Opp. at 14, moreover, only confirms the need for a Court order compelling the production of all electronic documents by a date certain.

The Tolkien/HC Parties' ultimate argument regarding the backup tapes is based on the unfounded assertion that the "cost, expense, and difficulty that will be incurred in any attempt to restore numerous backup tapes" is a valid reason not to restore or search them. Opp. at 14. But, the Tolkien/HC Parties have offered no evidence to support this supposed burden. Indeed, when Warner asked the Tolkien/HC Parties' counsel on January 30 about whether they had asked anyone at Manches how expensive or burdensome it would be to restore the Manches backup tapes, they admitted that they had not. Jih Decl., ¶ 9. The same is true for HarperCollins. When pressed, counsel for the Tolkien/HC Parties admitted that they have not asked HarperCollins about the actual costs, monetary or otherwise, of restoring and searching their backup tapes. *Id.* A party cannot merely claim burden as a means to avoid its discovery obligations; it must prove that such a burden would actually exist. *See, e.g., Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005) (the party claiming burden has "an obligation to provide sufficient detail in terms of time, money and procedure required to produce the requested documents"). Given their failure to substantiate their claim of burden, the Tolkien/HC Parties have provided no reason why the Court should not enter an order requiring them to search the Manches and HarperCollins backup tapes.[3]

[3] Warner, by contrast, has already provided the Tolkien/HC Parties with a cost estimate for restoring the New Line backup tapes. The Tolkien/HC Parties implicitly conceded that it would be unduly burdensome for Warner to bear these

B. The Tolkien/HC Parties Must Complete Their Production of Hard-Copy Documents By a Date Certain

The Tolkien/HC Parties insist that they have already completed a thorough collection of hard-copy documents and expect Warner—and the Court—to take them at their word. The Tolkien/HC Parties provide no evidentiary support for their statement of compliance. Instead, the Tolkien/HC Parties rely entirely on Ms. Haye's meet-and-confer letter, which is itself based on nothing but inadmissible hearsay. Haye Decl., Ex. I. The Tolkien/HC Parties' unsworn "understanding" of what some unnamed individuals may have done to search for and collect hard-copy documents is insufficient to assuage Warner's concerns about the incompleteness of the Tolkien/HC Parties' production, nor is it a basis for opposing Warner's Motion.

Warner has good reason to be concerned about unsworn representations from lawyers about what others may have done. For example, the Tolkien/HC Parties have "repeatedly explained" that HarperCollins does not maintain hard-copy documents by custodian, but stores them in "central files" instead. *Id*. Just this past Friday, however, David Brawn, the Publisher of Estates at HarperCollins with responsibility for the Tolkien Works since 1995, testified that he does in fact maintain his own paper files related to the Tolkien Works, and that he stores them in and around his office. Jih Decl., Ex. 3 at 26:25-29:4. He further testified that his staff maintains files of their own. *Id*. The Tolkien/HC Parties cannot avoid the imposition of a court order through such unsworn (and inaccurate) representations.

The parties' January 30 meeting confirmed that the Tolkien/HC Parties' counsel lack any personal knowledge about the collection of hard-copy documents. For instance, although the Tolkien/HC Parties have represented to Warner that Mr. Maier and Ms. Blackburn sent "all Tolkien film, merchandising and trademark related files to Greenberg Glusker for review," Haye Decl., Ex. I, they could not

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costs, as, prior to Warner's Motion, they said nothing about New Line's tapes in the two months after Warner provided this information.

confirm who had collected such "film, merchandising, and trademark files," nor could they provide any information about how these files were segregated from other Tolkien-related documents. Jih Decl., ¶ 12. The Tolkien/HC Parties' outside counsel likewise lack firsthand knowledge of how hard-copy documents were collected from HarperCollins. *Id*., ¶ 13. Even if documents are stored in England, this does not excuse the responsibility of the Tolkien/HC Parties' counsel to personally ensure that all responsive documents have been collected and produced. *See, e.g.*, *Bortex Indus. Co. v. Fiber Optic Designs, Inc.*, 2013 WL 6228978, at *8, *14 (E.D. Pa. Dec. 2, 2013).

The Tolkien/HC Parties reassure the Court that there is not "a single category of documents that … should have been produced, but are missing from the Tolkien Parties' production." Opp. at 19-20. Warner hopes this is true. If it is, the Tolkien/HC Parties have no reason to object to an order requiring that they complete their production of hard-copy documents by a date certain.

C. <u>The Tolkien/HC Parties' Qualified Agreement to Produce Custodian Information is Improper</u>

The Tolkien/HC Parties' continued insistence that they have already provided "sufficient" custodian information is unacceptable. It is also clearly at odds with their previous agreement. On June 22, 2013, Warner and Zaentz proposed that the parties exchange certain "metadata" for both their electronic and hard-copy documents. Lens Decl., Ex. 8. This proposal included the exchange of custodian information for all documents. *Id*. On July 9, 2013, the Tolkien/HC Parties agreed to "provide all requested data regarding hard copy documents," including custodian information. *Id*., Ex. 7. The Tolkien/HC Parties also agreed in their July 9 letter to exchange custodian metadata for electronic documents. *Id*. The Tolkien/HC Parties now take the position that their agreement to provide "custodian" information requires only that they specify the "company" from which

a document was collected. This distortion of the parties' agreement overlooks the fact that "company" is a separate and distinct category of information that the Tolkien/HC Parties agreed to produce on August 7, 2013. Jih Decl., Ex. 2.

The Tolkien/HC Parties make no effort to hide their failure to provide true "custodian" metadata for the electronic documents they have produced to date. Their only excuse is their argument that Zaentz has produced custodian information in a manner similar to the Tolkien/HC Parties. Opp. at 10. This is irrelevant. The Tolkien/HC Parties cannot condition their own compliance on the agreement of a party whose discovery practices are not even before the Court.

The Tolkien/HC Parties also continue to refuse to produce custodian information for hard-copy documents. They feign confusion about how they can be expected to provide custodian "metadata" for hard-copy documents, but this, too, is disingenuous. When the Tolkien/HC Parties agreed to provide hard copy "metadata" on July 9, they never questioned what this meant. Now, however, they refuse to provide custodian information for hard-copy documents merely because they claim that Warner and Zaentz have not yet agreed to do the same. But Warner *has* agreed. Haye Decl., Ex. J. (Warner "will, of course, continue to provide custodian information with our productions…."). Warner asked the Tolkien/HC Parties on January 30 to identify any missing custodian information from Warner's hard-copy productions. Jih Decl., ¶ 14. The Tolkien/HC Parties have not yet done so. *Id*. As for Zaentz, their discovery practices are immaterial to Warner's Motion. Zaentz's practice to date has no bearing on whether Warner is entitled to evaluate the completeness of the Tolkien/HC Parties' production.

D. The Tolkien/HC Parties Have Not Mooted Warner's Concern About Document Preservation

The Tolkien/HC Parties suggest that any concerns about their efforts to preserve documents in this litigation have been mooted because "plaintiffs have

provided the information Warner requested." Opp. at 9. But, as the conference between the parties on January 30 made clear, the information the Tolkien/HC Parties have provided to date is incomplete and disconcerting.

The Tolkien/HC Parties purport to rely on a document preservation notice that was issued in 2008—in a separate lawsuit. The Tolkien/HC Parties have yet to identify who at the Tolkien/HC Parties received that notice, what categories of documents were preserved pursuant to the hold, precisely what steps the Tolkien/HC Parties took to ensure that documents relevant to this dispute were preserved, or why they believe a preservation notice for a different case could satisfy their obligations in this one. The Tolkien/HC Parties also claim that their document preservation notices are privileged, but that privilege does not survive where there is evidence of spoliation. *See Major Tours, Inc. v. Colorel*, 2009 WL 2413631, at *2 (D. N.J. Aug. 4, 2009). In any event, the Tolkien/HC Parties can cite no reason why they should not be ordered to provide the information Warner seeks in its Motion. *See, e.g., In re eBay Seller Antitrust Litigation*, 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007).

IV. THE TOLKIEN/HC PARTIES MUST PRODUCE A MEANINGFUL PRIVILEGE LOG

The Tolkien/HC Parties premise their entire response to Warner's request for a privilege log on the falsehood that Warner has not agreed to a reciprocal exchange. This is demonstrably false—indeed, an exhibit the Tolkien/HC Parties attach to their opposition contains a clear statement by Warner that it is already "in the process of preparing [a] privilege log." Haye Decl. Ex. J. In any event, this argument continues to miss the point entirely. Warner needs a log specifically to evaluate the Tolkien/HC Parties' groundless claims of privilege. While the parties did previously agree to forgo the mutual exchange of privilege logs, Warner's Motion is not based merely on some change of heart. Nor is it Warner's burden to

show "good cause" in order to obtain a log from the Tolkien/HC Parties. Warner specifically reserved its right to demand the production of a privilege log from the Tolkien/HC Parties. Lens Decl., Ex. 7. It did so to protect its ability to challenge the types of baseless privilege claims the Tolkien/HC Parties now try to assert.

The Tolkien/HC Parties suggest that the propriety of their privilege claims is not before the court. Again, this is not true. If it were, the Tolkien/HC Parties should have no problem agreeing to provide the log requested by Warner in its Motion. Instead, the log the Tolkien/HC Parties have conditionally agreed to provide, *see* Opp. at 8, would deliberately omit the detail Warner seeks.

The parties' January 30 conference underscored the need for the Tolkien/HC Parties to provide a privilege log:

- The Tolkien/HC Parties confirmed again during this conference that they are withholding *all* non-third-party communications involving Ms. Blackburn or Mr. Maier on the basis of the attorney-client privilege. Jih Decl., ¶ 10. This is plainly inconsistent with both witness's testimony that each serves in a non-legal role—Ms. Blackburn as the company secretary for The Tolkien Estate and The Tolkien Trust, and Mr. Maier as a director of The Tolkien Estate. Lens Decl., Ex. 4. Ms. Blackburn's CV even admits that she manages the *business* of the Tolkien Estate. Lens Decl., Ex. 6.
- The Tolkien/HC Parties did not dispute that only a common *legal* interest can justify the application of the common interest privilege. Nevertheless, the Tolkien/HC Parties confirmed once again during the parties' January 30 conference that they are withholding every communication between the Tolkien Parties and HarperCollins Parties on the basis of some purported joint defense. Jih Decl., ¶ 11. It defies belief, however, that *every* communication between the Tolkien Parties and HarperCollins Parties over the course of more than forty years reflects a

shared understanding of the division of rights between both sets of entities. It is also patently unreasonable to suggest that each and every communication between the Tolkien Parties and HarperCollins Parties reflects a common legal, as opposed to commercial, purpose.

- The Tolkien/HC Parties did not dispute that they are asserting a broad common interest privilege over communications between themselves and Zaentz. Their suggestion that any such privilege—to the extent it existed initially—has survived the Tolkien/HC Parties' filing of this lawsuit against Zaentz, and that it prevents Zaentz's co-defendant from viewing such purportedly privileged documents, has no support in law or reason. *Dexia Credit Local v. Rogan*, 231 F.R.D. 287, 295 (N.D. Ill. 2005).

In light of these confirmations, the Tolkien/HC Parties' qualified agreement to provide a privilege log is meaningless. The Tolkien/HC Parties have made clear that whatever log they intend to provide will only seek to mask their unfounded claims of privilege. Because the Tolkien/HC Parties have not agreed to provide the specific information that Warner has requested in its Motion, this issue can only be resolved by entry of a court order.

V. CONCLUSION

For all the foregoing reasons, as well as the reasons cited in Warner's Motion, Warner respectfully requests that the Court grant Warner's Motion.

Dated: February 10, 2014

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